United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

DOCKET NO.

76-7082

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by:
V. Bryan Medlock, Jr.

MUNTERS CORPORATION

Plaintiff-Appellee

v.

BURGESS INDUSTRIES INCORPORATED

Defendant-Appellee

and

BUFFALO FORGE COMPANY

Defendant-Appellant

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
GRANTING A PRELIMINARY INJUNCTION

Brief for Defendant-Appellee
Burgess Industries Incorporated

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I

PRELIMINARY STATEMENT

Munters Corporation commenced this declaratory judgment action against two of its customers, Burgess Industries Incorporated and Buffalo Forge Company, on September 19, 1975.

Munters is a manufacturer of a patented "Media" or "Fill" which is used in evaporative coolers. Munters, in October 1972, agreed with one of the two customers, Buffalo Forge, that it would not sell the "Munters Media" to anyone who intended to use the "Munters Media" in an evaporative cooler to be used in cooling air for certain size gas turbine engines. Burgess subsequently wanted the "Munters Media" for use in the area arrogated by the agreement to Buffalo Forge and was refused the material by Munters. Burgess advised Munters that its refusal to sell the material to Burgess constituted a violation of the antitrust law, 15 U.S.C. §§ 1, 2, 14 and 15. Buffalo Forge threatened to sue Munters if it provided Burgess with the "Munters Media". Munters, presented with this dilemma, asked the District Court in its declaratory judgment complaint to determine whether the October 1972 agreement between it and Buffalo Forge is valid and enforceable or whether it is invalid and unenforceable because it violates the antitrust laws.

Burgess moved shortly after commencement of the action for a preliminary injunction ordering Munters pendente lite to supply it with "Munters Media", which motion was granted by United States District Judge Charles H. Tenney on January 26, 1976. This appeal if from that Order.

II

ISSUES PRESENTED

A. Did the District Court properly conclude that:

1. the refusal by Munters to provide Burgess with "Munters Fill" presented a serious question of law; and

2. the equities, when balanced, tipped decidedly in favor of granting preliminary relief to Burgess?

B. Did the District Court commit error in fixing the security for issuance of the preliminary injunction at $25,000?

III

THE PRINCIPAL FACTS

A. The Parties

Munters is a manufacturer of patented "media" or "fill" usable in evaporative coolers (App.* 6, 12-13). This media is sometimes referred to as "Munters Media" or "Munters Fill". Munters is in the business of manufacturing Munters

*References to the Appendix will be "App." followed by the page number to which reference is made.

Fill and selling it to its customers (App. 12). Munters Fill is a patented commodity (App. 6, 84).

Buffalo Forge and Burgess are customers of Munters (App. 7). Both have purchased the patented Munters Fill for use in unpatented evaporative coolers (App. 7). Burgess and Buffalo Forge are the principal competitors in the manufacture of evaporative coolers for use with gas turbines, especially those turbines having a minimum rated capacity of at least 500 horsepower (App. 42).

B. The Agreement

The Agreement, which Burgess charges is unlawful and unenforceable, was entered into by Munters and Buffalo Forge on October 2, 1972 (App. 12-28). Although characterized by Munters and Buffalo Forge as a "license", the Agreement:

1. grants no manufacturing rights to Buffalo Forge (App. 14);

2. provides that Buffalo Forge purchase its requirements of the patented fill from Munters (App. 16);

3. calls for no royalty payment to Munters, Buffalo Forge paying the same purchase price Munters charges its other customers, even when the fill is employed by Buffalo Forge in the exclusive Product Use Area defined in the Agreement (App. 15-17); and

4. contains a commitment by Munters that it will not knowingly sell Munters Fill to customers whose intended use is in the exclusive Product Use Area (App. 15).

C. Burgess Need for Munters Media

Several Burgess customers specified the use of Munters Media in requesting bids from Burgess for evaporative coolers to be used with gas turbine engines (App. 41). Burgess was successful in obtaining orders from Solar (a division of International Harvester Company), Westinghouse, General Electric and Sui-Northern Natural Gas Company for evaporative coolers which were to utilize Munters Media and be used to cool air for gas turbine engines (App. 42). Munters, however, refused to sell Munters Media to Burgess to fill these orders (App. 7-9, 44), and did so only after entry of the Preliminary Injunction by the District Court.

Burgess was not aware of any material which could be substituted for Munters Media, within the limits of the specifications of the customers and economic limits, and its ability to compete with Buffalo Forge would have been materially and adversely affected had Munters succeeded in withholding from Burgess Munters Media for use in coolers for gas turbine engines (App. 43).

The refusal by Munters to provide Burgess with Munters Media could have caused Burgess to suffer a revenue

loss of $230,000 (the value of the orders from Solar, Westinghouse, General Electric and Sui-Northern Natural Gas) and was reasonably expected to cause an additional $350,000 loss due to Burgess' loss of additional orders from customers to whom bids had been made and from whom Burgess had received an indication that its bid has been favorably received (App. 43).

It was further believed that the inability to obtain Munters Media for use in cooling air for gas turbine engines would cost Burgess $1,000,000 in business during 1976 (App. 42)

IV

THE DISTRICT COURT APPLIED THE PROPER STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

In his Memorandum Opinion of January 19, 1976, Judge Charles H. Tenney identified the standard which he was applying in evaluating the propriety of issuing the preliminary injunction when he observed:

> "The standard for issuance of a preliminary injunction was recently enunciated by the Second Circuit as follows:
>
> > 'the standard factors which the court now considers upon an application for a preliminary injunction are well known: (1) clear likelihood of success on the law and the facts then available and possible irreparable injury, or (2) sufficiently serious questions on the merits making them fair ground for litigation and a balance of the equities tipping decidedly in favor of preliminary relief.' Columbia Pictures Industries, Inc. v. American Broadcasting Companies, Inc., 501 F.2d 894, 897 (2d Cir. 1974)."

This standard is the proper one and no one can take serious issue with it.

V

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE REFUSAL BY MUNTERS TO PROVIDE BURGESS WITH "MUNTERS FILL" PRESENTED A SERIOUS QUESTION OF LAW

In applying the standard set out above, the trial court applied the alternative or second test for determining the propriety of issuing the preliminary injunction. Particularly, it decided that the issues before the court presented sufficiently serious questions on the merits to make them fair grounds for litigation.

A. The controversy does present serious questions of law because the October 1972 agreement between Munters and Buffalo Forge is *per se* illegal because it restricts the use of a patented article after sale by the manufacturer-patentee.

The Munters-Buffalo Forge Agreement prohibits Burgess and others from using the patented Munters Fill, which they purchase from the manufacturer-patentee Munters, in a designated Product Use Area and arrogates that Product Use Area exclusively to Buffalo Forge (App. 12-28). As set forth in Article II, paragraph 1 of the Agreement:

"... Munters Florida grants to Buffalo ... the exclusive right and sublicense under the Fill Patents to use and sell Munters Fill solely for use in the Product Use Area throughout the Exclusive Territory ..."

The various terms used in Article II, paragraph 1 <u>supra</u> are defined in Article I of the Agreement as follows:

"As used hereinafter the following terms shall have the following meanings, respectively:

a) 'Munters' Fill': a cross-fluted, corrugated packing material produced commercially by Munters Florida for use presently outside the Product Use Area and disclosed in at least some of the Fill Patents;

b) 'Product Use Area': evaporative cooling applications for cooling air, where the cooling of the air is obtained by evaporation of moisture therein, for gas turbines having a minimum rated capacity of at least 500 Horsepower and for the equipment connected thereto;

c) 'Exclusive Territory': the United States and its territories and possessions;

* * *

e) 'Fill Patents': United States Letters Patent under which Munters Florida has the exclusive right to make, use and sell the Munters' Fill in the Exclusive Territory for use in the Product Use Area and to sublicense others thereunder, said patents being set forth and identified in Appendix 'A' attached hereto."

The evaporative coolers into which Buffalo Forge puts the patented fill are themselves unpatented (App. 12).

Buffalo Forge is granted no manufacturing rights whatsoever under the Agreement:

> "... Nothing in this Agreement shall be interpreted or construed to grant to Buffalo or its customers any rights whatsoever to manufacture Munters Fill." (App. 14, Article II, paragraph 1.)

Instead, the Agreement expressly provides that Buffalo Forge purchase its requirements of the patented fill for use in the Product Use Area from Munters.

> "Buffalo desires to and shall, during the term of this Agreement, purchase from Munters Florida, and Munters Florida agrees to sell exclusively to Buffalo, a substantial portion of Buffalo's fill requirements for use in the Product Use Area in the Exclusive Territory; and Buffalo will use Munters' Fill in the Product Use Area in the Exclusive Territory except when its customers desire other types of fill to be used." (App. 16, Article IV, paragraph 1.)

Buffalo pays no royalty to Munters when it uses the patented fill in the exclusive Product Use Area. Munters' only reward comes from the profit upon the sale of the patented fill. Buffalo Forge purchases the patented fill from Munters at the "standard prices and terms." As stated in Article IV, paragraph 2 of the Agreement:

> "The price to be charged and the selling terms to be granted by Munters Florida to Buffalo shall be Munters' standard prices and terms, in effect at the time an order is placed... ."

Munters' standard prices and terms are defined as follows:

> " 'Munters' standard selling prices and terms': the selling prices and terms charged by Munters Florida for identical products offered for sale and/or sold to others by Munters Florida for use outside of the Product Use Area;" (Exhibit B-16, Article I, paragraph d.)

The Munters-Buffalo Forge Agreement is a supply contract pursuant to which the patentee Munters manufactures and sells patented fill to Buffalo Forge at the same price it sells the same fill to Burgess and others. The transaction contemplated by the Agreement is a sale, not a license.

The Agreement has the effect, however, of restricting the use to which Burgess can put the patented fill which Burgess purchases from the manufacturer-patentee Munters. The Agreement constitutes an illegal restraint of trade because the sale of a patented article by a patentee "exhausts" the patent monopoly. The Supreme Court unequivocally so held in United States v. Univis Lens Co., 316 U.S. 241, 250 (1942).

> "The declared purpose of the patent law is to promote the progress of science and the useful arts by granting to the inventor a limited monopoly, the exercise of which will enable him to secure the financial rewards for his invention. Constitution of the United States, Art. I, §8, Cl. 8; 35 U.S.C. §§31, 40. The full extent of the monopoly is the patentee's 'exclusive right to make, use, and vend the invention or discovery.' The patentee may surrender his monopoly in whole by the sale of his patent or in part by the sale of an

> article embodying the invention. His monopoly remains so long as he retains the ownership of the patented article. But sale of it exhausts the monopoly in that article and the patentee may not thereafter, by virtue of his patent, control the use or disposition of the article. Bloomer v. McQuewan, 14 How. 539, 549-50; Adams v. Burke, 17 Wall. 453; Hobbie v. Jennison, 149 U.S. 355. ..." (emphasis added).

That holding was reiterated more recently in Hensley Equipment Co. v. Esco Corp., 383 F.2d 252, 263 (5th Cir. 1967).

> "... Patent monopoly is 'exhausted' by the first authorized sale of the patented item, and the patent law does not protect attempts by the patentee or his licensees to control use of the product after such sale. United States v. Univis Lens Co., 316 U.S. 241, 62 S.Ct. 1088, 86 L.Ed. 1408 (1942). ..."

Munters and Buffalo Forge attempt to justify their Agreement as a "field of use" license of the type upheld in General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 174 (1938). There is a crucial difference, however, between the agreement involved in General Talking Pictures and that which is at issue here. As recognized by the Supreme Court in General Talking Pictures:

> "... Pertinent words of the license are these: 'To manufacture ... and to sell only for radio amateur reception, radio experimental reception and radio broadcast reception. ...' ..." (304 U.S. at 181)

Thus, in General Talking Pictures the licensees had the right to and in fact did manufacture as well as sell the patented

article. As a result, the "first authorized sale" was made by the licensee, not the patentee. Here it is the manufacturer-patentee Munters who makes the first sale and not its "licensee" Buffalo Forge. Indeed, since Buffalo Forge was granted no manufacturing rights whatsoever, it could not make the first sale.

Apposite here is United States v. Consolidated Car-Heating Co., Inc., 1951 Trade Cases ¶62,656 (S.D.N.Y. 1950). The defendant-patentee manufactured a patented alloy used by dental laboratories in making false teeth. It also manufactured patented electric furnaces used to melt the alloy in order to mold it. It entered into license agreements with laboratories whereby they bought the alloy and leased the furnaces. The licensees, however, were limited to using the alloy for the purpose of making dentures.

Judge Coxe granted the government's motion for summary judgment and struck down as violating the antitrust laws the provision of the license agreement which sought to control the use of the patented alloy after it was sold by the manufacturer-patentee.

> "A patentee may grant a license 'upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.' (United States v. General Electric Co., 272 U.S. 476, 489.) A patentee may grant a license to use his patented machine and provide that it shall

> be used only for a particular purpose. (General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 181, 305 U.S. 124, 127). But he may not grant a license to use his patented product, which can be purchased only from him, in manufacturing another product, whether patented or not, and provide that it shall be used only to manufacture that product. This is because the patented product, when it has been sold, passes outside the limits of the patent monopoly and the patentee cannot attach any further conditions upon its use by the purchaser. The patentee has received his full reward for the use of his patented product in the price which he received when he sold it. (United States v. Univis Lens Co., 316 U.S. 241, 250-252.) That is especially true in such a case as this, where the licensee is not required to pay any royalties and the licensor's only reward comes from the profit upon the sale of his patented product to his licensee." United States v. Consolidated Car-Heating, supra, at ¶ 63, 903.

Also, in point is the recent unpublished decision in United States v. Ciba-Geigy Corp., (D.N.J., April 14, 1976), a copy of which is supplied herewith. The defendant-patentee manufactured a patented drug called hydrochlorothiazide ("HCT") which was useful as a diuretic. Ciba-Geigy entered into a series of supply agreements with other pharmaceutical companies pursuant to which Ciba-Geigy manufactured and sold HCT in bulk. The supply agreements, however, contained a restriction on the use to which the vendees could put the HCT which they purchased from the manufacturer-patentee. The vendees were restricted to using the HCT only in combination with another pharmaceutically

active material. The Court held this restriction on the use of the patented article manufactured and sold by the patentee to be a per se violation of Section 1 of the Sherman Act.

> "The proof in this case has shown a series of supply agreements which limit, in varying degrees, the range of uses to which the purchaser was entitled to put the [patented] vended material. Although these contracts were reached in a vertical, supplier-purchaser, context, they, in fact, were designed to limit horizontal competition between CIBA and its vendees. Such agreements are more pernicious antitrust violations than simple vertical restraints, for, as a result of them, 'cartel activity then co-exists with the attempt to vertically control the discretion of the independent businessman.' Interphoto Corp. v. Minolta Corp., 295 F.Supp. 711, 718, n.2 (S.D. N.Y.), affirmed 417 F.2d 621 (2d Cir. 1969)." (Slip Opinion, p. 55).

To summarize, a patentee may grant a valid "field of use" license provided that the licensee has the right to and does in fact manufacture the patented article so that the licensee and not the patentee makes the first authorized sale. General Talking Pictures, supra. A patentee may not, however, sell the patented article and then attempt to fetter in any way the use to which it is put, for the sale of the patented article by the patentee "exhausts" the patent monopoly. United States v. Univis Lens, supra; United States v. Consolidated Car-Heating, supra; United States v. Ciba-Geigy, supra.

The Munters-Buffalo Forge Agreement restricts the use to which Burgess may put the patented fill which it purchases

from the manufacturer-patentee Munters. The Munters-Buffalo Forge Agreement constitutes a per se violation of the Sherman Act. United States v. Univis Lens, supra; United States v. Ciba-Geigy, supra.

B. The Munters-Buffalo Forge Agreement also presents a serious question because it restricts the use of a patented article after sale by the manufacturer-patentee and resale by the vendee, and is therefore per se illegal on an additional ground.

As brought out supra, the Munters-Buffalo Forge Agreement restricts the use to which Burgess and others may put the patented fill which they purchase from the manufacturer-patentee Munters. The Agreement goes further, however, and restricts the use to which customers of Burgess may put unpatented evaporative coolers which contain the patented fill.

Article II, paragraph 1 of the Agreement provides:

> "... Munters Florida grants to Buffalo ... the exclusive right and sublicense under the Fill Patents to use and sell Munters Fill solely for use in the Product Use Area throughout the Exclusive Territory, and to sublicense others to use such licensed Munters Fill obtained from Buffalo solely for use in the Product Use Area throughout the Exclusive Territory. ..." (emphasis added).

Thus, only by purchasing an unpatented evaporative cooler containing the patented media from Buffalo may the purchaser use that unpatented cooler in the exclusive Product Use Area because

only Buffalo, not Burgess, has the right to sublicense others (the purchasers of unpatented evaporative coolers) to use the coolers in the exclusive Product Use Area.

Although the patented fill is sold to Burgess by the patentee Munters and resold by Burgess as part of an unpatented article, the Agreement prohibits Burgess' customers from using the twice-sold patented fill in the exclusive Product Use Area. Since the Supreme Court ruled in Univis Lens, supra, that the sale of a patented article by a patentee "exhausts" the patent monopoly, a restraint on the resale of that same article cannot stand.

In Hensley Equipment Co. v. Esco Corp., supra, Esco had granted a license to Caterpillar which provided that Caterpillar could itself manufacture the patented parts (383 F.2d at 263). In practice, however, Caterpillar did not manufacture but purchased all of the patented parts from the patentee Esco and its subsidiaries and licensees (Ibid.). The Esco-Caterpillar license went further and imposed a restriction on the use and resale of the patented parts purchased by Caterpillar from authorized sellers (383 F.2d at 263, note 22). The Court held this restriction to be a per se violation of the antitrust laws.

In formulating its decision the Court relied on United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967),

which it read as holding that it is "a *per se* violation of the Sherman Act for a manufacturer to restrict persons to whom an article may be traded after the manufacturer has parted dominion with it." (383 F.2d at 263). The Supreme Court in *Schwinn*, *supra*, stated the law as follows:

> "... Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. (citations omitted). Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale. To permit this would sanction franchising and confinement of distribution as the ordinary instead of the unusual method which may be permissible in an appropriate and impelling competitive setting, since most merchandise is distributed by means of purchase and sale. (388 U.S. at 379).
>
> * * *
>
> "... Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred - whether by explicit agreement or by silent combination or understanding with his vendee - is a per se violation of §1 of the Sherman Act." (388 U.S. at 382).

The Court in Hensley reached its conclusion despite the fact that it was "not clear that the restriction limiting resale of parts to Caterpillar dealers was required by Esco"; it was sufficient that "the agreement here confines access to dealers Caterpillar selects." (383 F.2d at 264).

In the instant case it is sufficient that the Munters-Buffalo Forge Agreement restricts access to the exclusive Product Use Area to customers of Buffalo Forge, despite the sale of the patented fill by the patentee Munters and resale of that fill by Burgess. That being the case, there is a *per se* violation of the Sherman Act and:

> ". . . there is no inquiry into purity of heart vs. bad motive, or market impact, or matters of what may seem to be essential fairness. . ." (*Hensley* v. *Esco*, *supra*, 383 F.2d at 264).

From the foregoing it can be seen that the Court quite properly concluded:

> "that the questions raised are serious enough to present fair grounds for litigation***" (App. 100).

VI

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE EQUITIES, WHEN BALANCED, TIPPED HEAVILY IN FAVOR OF GRANTING RELIEF TO BURGESS

If the District Court had permitted Munters to deny Burgess the Munters Media, Burgess would have suffered

irreparable injury to its goodwill. Burgess would have been unable to supply equipment which had been ordered from it by Solar, Westinghouse, General Electric and Sui-Northern Natural Gas. Failure to supply this material would have not only resulted in an impossible to estimate damage to the goodwill of Burgess, but a very real loss of profits in a significant amount. As pointed out in the affidavit of Mr. Ronald Yaeger, General Manager of Burgess' Environmental Systems Division, denial of the preliminary injunction would have inflicted on Burgess a loss of $230,000 current business and an anticipated $1,000,000 loss of business in 1976. In view of the fact that cost of the Munters Media only represents 15% of the total selling price of the evaporative coolers ordered by the customers, denying the media to Burgess would truly have imposed an unwarranted burden on it. The only real effect which granting of the requested preliminary injunction had upon Buffalo Forge was to cause it to compete with Burgess in an open and free market. To have denied the injunction would have been to deny gas turbine customers for evaporative coolers and allied equipment free and open competition in the marketplace for equipment not covered by Munters Media, a result the District Court would not condone.

The District Court did not err in concluding that the equities, when balanced, tipped heavily in favor of granting Burgess the requested relief.

VII

THE SECURITY SET BY THE DISTRICT COURT WAS ADEQUATE AND NO ADJUSTMENT SHOULD BE MADE

Buffalo Forge would have this Court believe that because it must compete with Burgess, Burgess will automatically obtain every order and Buffalo Forge will thereby be damaged in the amount of the profit it would have realized had it made the sale. There are several fallacies with this argument. First, there is absolutely no evidence in the record that should Buffalo Forge be the only company capable of supplying Munters Media in evaporative coolers for gas turbine engines, customers would purchase the Buffalo Forge coolers. It is believed as likely that customers when presented with a monopoly situation enjoyed by a supplier would choose evaporative coolers utilizing other media because the pricing by the monopolist would not be within reason. Also, should the media have to be replaced at a future date the customer would be at the mercy of the single source of supply of the media, notwithstanding the amount of initial price paid for the evaporative cooler.

Second, the damage which will occur to Buffalo Forge because it must engage in free competition with Burgess after entry of the injunction is not its lost profit on orders obtained by Burgess (as pointed out above, there is an absolute dearth of evidence that Burgess will obtain all future orders). Rather, the damage should be, if the injunction has been improvidently granted, the difference in the price

which Buffalo Forge has been required to charge for its evaporative coolers in order to meet Burgess' competition and that price which it would normally have charged had it a monopoly on Munters Media, a price which must of necessity be considerably smaller than its gross profit.

Buffalo Forge's own affidavits and arguments of counsel make it clear that Buffalo Forge has, at present, not been damaged one penny by this Court's injunction. Burgess in December, 1975, had current orders for evaporative coolers for gas turbine engines from Solar, Westinghouse, General Electric and Sui-Northern Natural Gas Company. Not one shred of evidence exists in this record that Buffalo Forge was even requested to bid on supplying evaporative coolers for any of these customers, or that should Burgess not have bid, the customers would have requested Buffalo Forge to bid.

Buffalo Forge's chief engineer, Robert Jorgensen, in his affidavit of February 20, 1976, admits that Westinghouse, which is one of the two major customers for evaporative coolers for gas turbine engines, prefers Burgess as a supplier and "Buffalo Forge has never been able to sell an evaporative cooler to the Westinghouse Philadelphia Division, although

it has never stopped trying" (Jorgensen Aff't of February 20, 1976, p. 3). Next, Buffalo Forge admits that it has been on strike for several months and unable to supply the other big customer for evaporative coolers, General Electric, with coolers. How can it now be rationally concluded that the entry of the injunction by this Court has precluded Buffalo Forge from obtaining the Westinghouse or the General Electric business.

So much for the past, when one looks to the future the only evidence which exists as to potential business is an estimate by Burgess that it expects to receive during 1976 orders for approximately one million dollars worth of equipment. Such figure is an estimate and at best speculative. It is not so definite that it should be relied upon as a basis for awarding a present increase in bond to Buffalo Forge based upon prospective business which Burgess is not even yet enjoying. It cannot be said that Buffalo Forge has been damaged at present or that any definite evidence exists that it will in the near future, before a trial can be had in this cause, be damaged. Nor does it comport with logic, in view of the speculative estimate as to future business, to require periodic review of the bond.

Further the trial of this action was held on March 22 and 23, 1976 and post trial briefs have been submitted. The District Court indicated on March 23 that it would decide the case "with dispatch" after briefing. It therefore seems to be a waste of this Court's time and resources to consider revising a bond in view of the imminency of the District Court's ruling on the merits of this case.

VIII

CONCLUSION

This declaratory judgment action presents serious questions of law arising from the *per se* illegality of the Munters-Buffalo Forge agreement of October 1972 and the District Court did not err in reaching that conclusion. The District Court was further justified in concluding that the irreparable injury which Burgess would suffer if it were denied Munters Media far outweighed any injury which Buffalo Forge might suffer because the District Court's Order required it to compete in open competition.

The $25,000 security required by the District Court need not be disturbed because Buffalo Forge has offered no plausible reason why it should.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 1976, the foregoing "Brief for Defendant-Appellee Burgess Industries Incorporated" was served on plaintiff-appellee by mailing a true copy thereof to:

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and was served on defendant-appellant Buffalo Forge Company by mailing a true copy thereof to:

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